No. 154.

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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 154.

Filed July 9, 1901.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

against

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY AND OTHERS.

Brief,

for the Appellant, The Interstate Commerce Commission.

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Supreme Court of the United States.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

AGAINST

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY and others.

October Term, 1901.
No. .

BRIEF,

for the appellant, The Interstate Commerce Commission.

STATEMENT.

On March 3, 1899, the Interstate Commerce Commission filed its petition in the Circuit Court of the United States for the Northern District of Illinois, to enforce an order by it against the appellees herein, originally made on January 20, 1898, and reaffirmed, after a rehearing on August 4, 1898. By this order the appellees were required to cease and desist from demanding, collecting and receiving, in addition to their regularly published transportation charges, the sum of $2 per carload of live stock as compensation for terminal services rendered in making delivery of live stock at the stockyards of the Union Stock Yards and Transit Company, in the City of Chicago—as the imposition of said rate had been found by the Commission to be unreasonable (Record, pp. 46–56).

Statement.

The petition (Record, pp. 1–56) set forth in detail that the proceedings before the Commission were instituted by a complaint of The Cattle Raisers' Association of Texas, filed on September 6, 1896 (Record, pp. 6–10); that The Chicago Live Stock Exchange, filed an intervening petition in support thereof on March 10, 1897 (Record, pp. 10–15); that answers were filed by the defendants; that the Commission duly made its findings of fact and conclusions of law and the order above mentioned (Record, p. 16–47); that upon a rehearing, the Commission made a supplementary report, findings and order (Record, pp. 47–56); that the defendants were duly served with said reports, findings and orders, and that they had refused to comply with the orders of the Commission. The defendants answered (Record, pp. 68–135) the petition of the Commission admitting that they had refused to obey said orders, but denying that they were lawful orders (Record, pp. 69, 78, 86, 96, 98, 103, 125, 128).

The cause came on for final hearing on November 6, 1899, before Hon. CHRISTIAN C. KOHLSAAT, District Judge, and judgment was rendered dismissing the petition (Record, p. 253). From the decree an appeal was taken to the Circuit Court of Appeals, where the decree of the Circuit Court was affirmed (Record, p. 270), principally upon the authority of Walker vs. Keenan, 73 Fed. Rep., 755 (Record, pp. 263–269; 103 Fed. Rep., 249). From this decree of the Circuit Court of Appeals the Interstate Commerce Commission has prosecuted this appeal (Record, p. 270).

The Commission treated the case as a question of fact, not law, and its findings of fact should be carefully noticed. Briefly they were as follows:

Previous to 1865 there were four depots for the delivery of live stock in Chicago, and railroads entering that city were obliged to make delivery at either one of these points, at the option of the shipper. This was expensive and inconvenient to the railroads, and the stock yards were established by the railroad companies for the purpose of providing a single point for delivery by all carriers.

By this action of the railroad companies the stock yards became the only live stock market in Chicago, and since 1865 all live stock intended for the Chicago market has necessarily been delivered at the stock yards, and must be so delivered now. The stock yards

became, in fact, the depot of all the roads for the delivery of live stock, and the expense of making delivery there was no greater than it would have been if the railroads had provided independent facilities. From 1865 until June 1, 1894, a shipment of live stock to Chicago under the published rate carried with it, as a matter, of course, a delivery at the stock yards.

On June 1, 1894, the Stock Yards Company, which had passed into other ownership, began to impose a charge upon the railroads for the use of its tracks in making such delivery, which amounted to $1 per car. Thereupon the railroad companies imposed upon the shipper an additional charge of $2 per car.

The Commission found that it was unreasonable for the railroad companies to impose a greater terminal charge upon the public than was exacted from them by the stock yards, for the reason that the present tariff already included the item of delivery. The Commission did not hold that the carriers might not legally segregate the rate and impose a terminal charge; it did not hold that a charge of $2 per car would be unreasonable for the performance of the service involved in a delivery at the stock yards, but it did hold that inasmuch as the rate already embraced that delivery it was unreasonable to make an additional charge for it. It further held that the imposition of this charge at Chicago worked an undue preference against that market.

That such is the substance of the findings of the Commission appears from the more detailed statement of those findings, which follows.

The evidence introduced by the appellant upon the trial consisted of certified copies of the proceedings before the Inter-State Commerce Commission and of its reports, findings and orders (Record, pp. 1–56; see 7 I. C. C. Reps., 513, 555*a*), and it was admitted by all the defendants that they had not complied with said orders, but had refused to do so (Record, p. 144). The findings of the Commission were as follows:

1. The Union Stock Yards and Transit Company was organized and chartered in 1865 for the purpose of constructing and establishing union stock yards at Chicago, together with trackage facilities to connect the different lines of railroad with the stock yards. The original capital was $1,000,000, all of which was paid in by the railway companies reaching Chicago, except $25,000. The capital

stock was subsequently increased to $13,000,000, and the mileage of the company's tracks, principally in the city of Chicago, now amounts to 240 miles. (Record, pp. 22, 23.)

2. Before the Union Stock Yards and its tracks were constructed, there were four different points in the city of Chicago at which live stock was delivered and marketed, and such deliveries were made by the railroad companies carrying live stock without any charge in addition to the regular through rate. On account of the burden of making this delivery and for the purpose of concentrating this business, the Union Stock Yards were constructed. Previous to June 1, 1894, the defendants had been accustomed to render the service of delivering cattle at the Stock Yards without exacting any charge in addition to the regular Chicago rate (pp. 19, 20). "At the present "time, the Union Stock Yards are the only live-stock market "in Chicago. Cattle shipped to Chicago for the purpose of being "sold upon the Chicago market must go to the stock yards, and "can only be got there by passing over the tracks of the (Stock "Yards) company in the same way that the various shipments in- "volved in this suit reach there. This fact was conceded by all "parties, and is perfectly well understood, both by the defendant "carriers and by the public" (Record, pp. 23, 34, 42, 43).

3. Until June 1, 1894, the railroads entering Chicago had the free use of the tracks and facilities of the Stock Yards Company for delivering live stock at Chicago, and the managers of the railroads remained on the board of directors of that company, although the stock of the railroad companies therein was disposed of between 1870 and 1878 (Record, (pp. 23, 24). On June 1, 1894, it was determined by the Stock Yards Company to impose a trackage charge of 40 cents per car each way in some cases and 75 cents per car in others, varying with the distance, on each car of live stock delivered by the several railroads at the Stock Yards, and this has since been paid by the several railroads reaching Chicago (Record, pp. 24, 31, 43). The railroads have since continued to use the tracks, moving live stock with their own engines and crews, in the same manner as they did before June 1, 1894 (Record, pp. 24, 25).

4. "Upon receiving notice of the purpose upon the part of the "Union Stock Yards and Transit Company to impose these trackage "charges, those of the defendants whose lines enter Chicago de- "termined to make a uniform charge of $2 per car for the delivery of

" all cars at the Stock Yards. In accordance with this determination " that rate was incorporated in the tariff to take effect June 1, 1894. " It is treated as a terminal or switching charge and is imposed in " addition to the regular Chicago through rate. It has been col- " lected since June 1, 1894, with the exception of a short time. " Only those defendants whose lines enter Chicago receive any part " of this charge, and they alone have to do with imposing and col- " lecting it " (Record, pp. 24, 34).

5. There was no change on June 1, 1894, from the pre-existing conditions of expense to the railroads for handling live stock into or out of the Stock Yards, except the trackage charge on live stock aforesaid. There has been no change since then, except that it is claimed that the railroads are able to handle live stock into the chutes at less expense by reason of certain improvements in transaction of the business by the Stock Yards Company (Record, pp. 42, 43).

6. " Some of the carriers profess to give the shipper the option of " sending his stock to Chicago or to the Stock Yards, and claim that " they do not deliver at the Stock Yards unless so directed. When " the stock is billed in Texas, the carrier inquires of the shipper " whether he desires that delivery be made at Chicago or at the " Stock Yards, and he is then informed that in case of delivery " at the Stock Yards this additional charge will be imposed. Other " carriers make no mention of this, relying upon the published tariff, " but inasmuch as the shipment is usually consigned to some com- " mission merchant whose place of business is at the Stock Yards, de- " livery is made there without further directions. If the option is " nominally given the shipper, it does not leave him any real choice. " If his stock is to be marketed at Chicago, it must go to the Stock " Yards, and can only go in this manner, as both he and the carrier " perfectly understand." (Record, pp. 24, 25.)

7. " Upon a survey of the whole situation, looking at these mat- " ters from the standpoint of both parties, what, in fairness to the " public and the railroads alike, ought to be done? This is " the thing for determination here. That the defendants may " charge one sum to Chicago and an additional sum for delivery at " the Union Stock Yards as a legal proposition, has been settled. " Whether they ought to make the charge they do, or any charge, or " whether the charge for delivery is already fairly included in the

" rate, is a proposition of fact for consideration. Under all the cir-
" cumstances, is this terminal charge a 'just and reasonable' one
" under the first section?" (Record, p. 41). Under these principles the Commission found that the charge was unreasonable (Record, pp. 43, 47).

8. On the rehearing, the Commission restated the whole matter of reasonableness of the rate as follows ((Record, pp. 49, 50): "To remove all doubt upon that subject, how-
" ever, if it is not clearly found, we now find that, looking
" entirely to the cost of service, and including as a part of
" that cost the trackage charge paid the Union Stock Yards and
" Transit Company and the unloading charge paid that same com-
" pany, the amount of this terminal, if under the circumstances of
" this case it is proper to impose the charge, is reasonable. If any
" modification of the present findings is necessary, they are hereby
" modified to that extent.

" That finding must, however, be carefully read in connection
" with the other facts in the case and the conclusion of the Com-
" mission that the imposition of this terminal charge is unreason-
" able. The defendants say it was admitted that this charge was
" reasonable, " provided any charge could be legally made for the ter-
" 'minal service." The intimation of the Commission was, as indi-
" cated in the above extract from the record, " that if this charge was
" ' proper to be imposed, it was a reasonable charge." The reason for
" the conclusion of the Commission is to be found in the distinction
" between these two statements. What the Commission passed upon
" finally was, not whether a terminal charge of this sort could be
" legally made—that had been already determined by the courts—but
" whether this particular charge could be properly imposed under the
" circumstances of this case. To avoid misapprehension we will
" restate here the grounds for our decision, and for that purpose we
" confine attention to this rate as it existed on May 31 and on June
" 1, 1894.

" May 31st there was in effect a certain rate on live stock from
" various points to Chicago, and that rate, upon the record in this
" case, must be taken to be a just and reasonable one. The defend-
" ants intimate in their answers that this rate has been forced down
" until it was too low, and something was said in the proof looking in
" the same direction. Upon the other hand, the complainants started

" in to prove that the rate at that time was too high, but, as is found " by the case, both these claims were virtually abandoned. There is " nothing in the record before us to show that the rate was other than " a right one, and we assume that May 31st the rate in effect was " just and reasonable.

" Now, just what did this live-stock rate to Chicago include? " The defendants insisted upon the reargument of this case that it " covered the transportation of that live stock to the point where, on " its way to the Union Stock Yards, it left the tracks of these several " defendants and nothing more. The complainants insisted that that " rate covered a delivery of the stock at the Stock Yards. We are " unable to see any ground whatever for the contention of the de- " fendants. As a matter of law, the undertaking to transport live " stock from one place to another includes a delivery of the stock. " Originally live stock brought to Chicago by these defendants upon " the Chicago rate must be delivered at any one of four different " points. This was necessitated by the actual competitive conditions " at that market.

" The railway companies, for the purpose of avoiding the ex- " pense and inconvenience of this kind of delivery, created the " present Stock Yards. It was entirely at their suggestion and " entirely for their benefit at the outset. From the time the Stock " Yards were constructed down to June 1, 1894, the various de- " fendants had, by arrangement with the Stock Yards Company, " the right to use the tracks of that company for the delivery of " this stock at the Stock Yards. By the action of the various " carriers that became the only place in Chicago at which live " stock could ordinarily be delivered. Whenever a carload of live " stock was shipped to Chicago, in the absence of special direc- " tions, it was taken to the Stock Yards. This was under- " stood both by the carrier and by the shipper. No defendant had " any facilities, previous to June 1, for delivering live stock in any " quantity at any other point than at the Stock Yards.

" Now, in view of the legal liability resting upon the carrier to " make a delivery somewhere, in view of the fact that this delivery " must be made at the Stock Yards and was habitually made there, " it seems impossible that the defendants in making this rate from " the point of shipment to Chicago did not include in that rate " and contemplate as a part of the service covered by that rate a

" delivery at the Stock Yards. It is absurd to say that the " Chicago rate paid for the transportation of that stock up to some " switch in the field, or in the city, where there was no facility for " a delivery, and that the transportation beyond that point was a " gratuity. We think and find that the Chicago rate on May 31, " 1894, included, as it had included for the last thirty years, a de- " livery and unloading of the stock at the Stock Yards, and that " rate, upon the record in this case, was a just and reasonable one.

" June 1, 1894, these defendants, by concerted agreement among " themselves, increased this rate $2 per car. If the rate on May " 31st was a just and reasonable one, the rate on June 1, was an un- " just and unreasonable one, unless some new condition justified the " imposition of that additional charge. We have found that to " the extent of $1 a new condition did justify the additional charge, " for the reason that then, for the first time, the Stock Yards Com- " pany exacted this trackage charge. In other words, the cost of " service to the defendants was increased by just $1 on that day. " It must follow, therefore, as a necessary conclusion, that of the " increase which the defendants made $1 was justifiable and $1 " was unjustifiable. This is not, however, because $2 is an unrea- " sonable charge for transporting a car to the stock yards, if that " service was performed by some independent agency, but because, " since the defendants were already receiving compensation for this " service, they ought not to charge for it a second time. Of this " proposition we have no doubt. Upon the assumption that the " rate May 31st was a just one, we regard the imposition of any- " thing above what the defendants were then compelled for the " first time to pay as an unwarranted exaction and a violation of " the first section of the act to regulate commerce, if it is possible " to violate that section " (Record, pp. 50, 51).

" The Commission assumes that, as a legal proposition, the " carrier may make a charge of the sort which it attempts to make " in this case, but it holds as a matter of fact, that it is unreasonable " to impose this terminal charge for the reason that the rate to " Chicago already includes that charge. The Circuit Court of " Appeals says that the carrier may segregate its rate, charging one " part to a certain point and another part beyond that point ; but " there is a wide difference between segregation and addition. " What the carriers have done here is to add an arbitrary sum for a

"service for which they are already receiving a reasonable compensation" (Record, p. 51).

"When, under the circumstances of this case, these defendants "through a long series of years charged a given rate for the receiving, transporting and delivering of live stock at the Union Stock "Yards, it must be held that this rate covered the entire undertaking, "and as a part of that undertaking that it yielded to the defendants "a fair compensation for transporting to the Stock Yards and there "unloading. And while the defendants may, if they choose, divide "this rate, they cannot arbitrarily increase the rate by adding a "terminal charge of the character indicated" (Record, p. 52).

"The defendants contend that the terminal charge is a reasonable one, and that if any part of the rate is wrong it is the "charge for transportation from the point of origin to the point in "Chicago where the cars leave their tracks. Abstractly this may "be true, but in dealing with these transportation problems the "purpose is to reach practical justice. The Chicago rate is so "much per hundred pounds, and would vary with the number of "pounds contained in each car. This terminal charge is a definite "amount per car. It would, therefore, be impossible to exactly "offset the terminal charge by any corresponding reduction in the "rate per hundred pounds. The terminal carrier at Chicago, as "the case shows, receives and retains the entire amount of this "terminal charge. Assuming, therefore, that this company was "already compensated for this service, it now receives and retains "just $1 too much per car. The only method by which absolute "justice can be done is to compel the carrier to desist from exacting this sum. Surely the fact that the railroad company is "already receiving pay for this service is good ground for holding "that a second charge is unreasonable" (Record, pp. 52, 53).

"It is also said that since the imposition of this terminal charge "the Chicago rate has been reduced, so that the total amount "to-day, including the terminal charge, is much less than it was in "1894, when the charge was imposed. The case finds that such a "reduction was made about October 1, 1896. That reduction did "not, however, apply to all the territory to which the terminal "charge applies, but only to certain limited portions of that territory, and the purpose of it was to equalize the rate from those "sections as compared with other sections. There is no claim

" that this reduction was made on account of the imposition of the " terminal charge, or that it would not have been made had no " terminal charge been imposed, nor that if the Chicago rate, June " 1, 1894, ought to have carried with it a delivery at the stock yards " the present rate should not likewise do so " (Record, p. 53).

9. On the rehearing, the Commission also found as follows in reference to the matter of undue prejudice as against Chicago (Record, pp. 54, 55); " for many years previous to June 1, 1894, the " defendants had maintained a certain fixed relation in rates " between these different cattle markets. On June 1, they " increased the expense of placing cattle upon the Chicago " market by just $2 per car. If the relative rates were " right before, and we may fairly presume, in the absence " of any claim to the contrary, that they were, this " charge disturbed those rates to that extent. If the increase in " the Chicago rate was justifiable, no undue prejudice would be " worked against Chicago. We have found that, to the extent of " $1.00 per car, it was unjustifiable. It results, therefore, that the " defendants have disturbed the just relation of rates between these " different centres by imposing without reason or justification an " additional charge upon the rate to Chicago. There being no " excuse for the imposition of this additional charge, we think it " necessarily follows that an undue prejudice against the market of " Chicago is thereby created. It is the want of justification which " makes the preference undue. In this connection it should be " observed that it is immaterial whether the Chicago rate is in- " creased by raising the entire rate or by imposing the terminal " charge. The expense of marketing live stock at Chicago is unjus- " tifiably made $1 per car greater in the case of that market, and to " that extent arises an undue preference."

The finding of the Commission was, therefore, briefly, that upon June 1, 1894, the Chicago rate covered the service of delivery at the Stock Yards; that there was no addition to the expense of the service save the $1 exacted by the Stock Yards Company after that date, and that the addition of a terminal charge of $2 was, therefore, unreasonable and an undue preference as against Chicago.

As already said (*supra*, 2), the defendants conceded that they had refused to obey the orders of the Commission. The only

evidence (Record, pp. 157–236) which they introduced upon the trial was the circulars which they had issued establishing, upon June 1, 1894, the $2 terminal charge in question.

The circulars were substantially the same as to each of the defendants (Record, pp. 184–192, 196–234). They were based upon a joint circular of the Western Freight Association, to which all the defendants belonged (Record, pp. 185, 242, 243), describing the charge as a terminal "charge *in addition* to the existing Chicago "rates" (pp. 244, 246). The circular of the Northwestern Company gave notice that after June 1, 1894, the tariffs on live stock "will, "*in addition* to the rates named to or from Chicago, be subject to a "terminal charge of $2.00 per car. This charge must in all cases be "*added* to the through rate and must be shown separately on the "way bill" (Record, p. 196). The circular of the Atchison Company (Record, pp. 185, 198) gave notice that after June 1, 1894, "tariffs on live stock and all other traffic received from or delivered "to the stock yards or industries located on the track of the Union "Stock Yards Railway, the Indiana State Line Railway and "Northern Indiana Railroad will, *in addition* to the rates named to "or from Chicago, be subject to a terminal charge of $2 per car," and that this amends all tariffs of the company. The other circulars are similar in their terms. These circulars, therefore, have no effect beyond showing that the charge was imposed; they are without force upon the question of its reasonableness (*infra* pp. 26, 27.

> The appellees in their brief below (p. 5), made the statement that these circulars provided that "the Chicago rate "should apply only on shipments of live stock not going to "the Stock Yards, but deliverable elsewhere in Chicago on "appellees' own lines of road, and that an additional charge "of $2 per car beyond the flat rate would be made on live "stock delivered at the Union Stock Yards." These circulars are spoken of as effecting a limitation of the Chicago rate to the defendants' own lines (p. 15); "the established tariffs "of the carrier explicitly separate the terminal service from "the preceding transportation service, and make separate "charges for the two different services" (p. 37). This is a figment of the imagination. The circulars contain nothing regarding any modification of the Chicago rate, but by their express terms merely *add* the terminal charge to the *existing* through rate.

The fact that two years after this charge was imposed and after proceedings were begun to test its legality, the Atchison Company issued a circular by which it set up a distinction regarding the delivery of live stock between a point in Chicago on its own line known as Corwith, and the Stock Yards, also in Chicago (Record, pp. 198, 199) does not aid the defendants. None of the other defendants made any such effort at any time, and the Atchison Company evidently had no such idea when the so-called terminal charge was imposed for it gave no such notice at that time. In any case, the matter is controlled by the finding of the Commission that the Stock Yards are really the depot of all the companies for the delivery of live stock.

In answer to a question by the court counsel said (Record, p. 234), " on the question of the division of the rates, we have no " other testimony to offer than the tariff sheets which we have " already offered." It will be seen, therefore, that the defendants introduced absolutely no defensive testimony. They contented themselves with affirmatively proving the imposition of the terminal charge which the Commission had already found unreasonable and undue and to prevent the continuance of which the present suit was brought.

Under this proof it is manifest that the Circuit Court erred in disregarding the finding of the Commission that the charge was unreasonable and an undue preference.

Assignment of Errors.

An assignment of errors in proper form is contained in the record (pp. 271–273). It sets forth that the circuit court of appeals erred in the following respects:

1. In that the said circuit court of appeals ordered that the decree of the circuit court of the United States for the northern district of Illinois, entered on the day of , 1899, wherein it was adjudged that the petition of appellant herein be dismissed, should be in all things affirmed.

2. In that the said circuit court of appeals did not order and adjudge that the decree of the circuit court of the United States for the northern district of Illinois dismissing appellant's petition herein should be in all things reversed.

3. In that the circuit court of appeals did not decide that the said circuit court erred in dimissing appellant's petition and in refusing to grant the prayer of said petition to enforce the orders of the Interstate Commerce Commission mentioned therein, and in not deciding that the findings of fact by the Interstate Commerce Commission that the $2 per car charge complained of was an unjust and unreasonable charge was supported by the evidence of the report and findings of said Commission and was made a *prima facie* case, and that the circuit court erred in not giving effect to the *prima facie* case thus made.

4. In that the circuit court of appeals did not decide that the said circuit court erred in holding that there was a segregation of the aggregate charges for transportation of live stock to Chicago, and that the through rate to Chicago did not embrace the service to the Union Stock Yards at Chicago, because the said Commission found as a fact that the compensation for the service of transportation to the stock yards was embraced in the through rate, and that the addition of the $2 terminal charge was an unreasonable exaction.

5. In that the circuit court of appeals did not decide that the said circuit court erred in holding that the mere publication of the $2 charge segregated the aggregate charges for transportation of live stock to Chicago so that the through rate would only embrace the service up to the junction point of the defendants' railroads with the stock yards' tracks, and that the $2 was a special rate applied for the service from that point to the stock yards.

6. In that the circuit court of appeals did not decide that the said circuit court erred in finding that " in 1893 the stock yards company assumed the entire work of hauling cars from the intersection of said stock yard tracks with defendants' lines, respectively, to the yards, and charged the defendants thereafter on the basis of what it had cost defendants theretofore for the same service." Whereas, the undisputed fact is, as found by the Commission, that the railroads have always handled the live stock with their own engines and crews over the stock yards' rails to the delivering chutes, and returning the empty cars.

7. In that the circuit court of appeals did not decide that the said circuit court erred in refusing to permit the petitioner to prove by the witness Chappell that the general managers of the railroads, including these defendants, entering the city of Chicago

from the west, entered into a combination in restraint of trade, and that the $2 terminal charge was made and promulgated by such combination, and that at the time such $2 charge was imposed it was in addition to the old rate, and that the old rate stood as it was previously.

8. In that the circuit court of appeals did not decide that the said circuit court erred in refusing to permit the petitioner to introduce in evidence upon the trial of said cause the testimony and exhibits taken before the Interstate Commerce Commission upon the original hearing of the said cause of the Cattle Raisers' Association against the defendants below.

9. In that the circuit court of appeals did not decide that the said circuit court erred in finding in its decree, in effect, that the $2 terminal charge in question in this suit was not unreasonable, unjust or unlawful.

10. In that the circuit court of appeals did not decide that the said circuit court erred in failing to find that the $2 terminal charge was made in addition to the through rates charged by defendants, and that the through rates covered the delivery of live stock to Chicago.

11. In that the circuit court of appeals did not decide that the said circuit court erred in finding that the said rates of the defendants on live stock were segregated by the imposing of said $2 charge.

12. In that the circuit court of appeals did not decide that the said circuit court erred in not granting a decree for plaintiff as prayed for, because the evidence showed that the terminal charge was a double charge for the same service, and was, therefore, unreasonable, unjust, and constituted an undue prejudice.

13. In that the circuit court of appeals did not decide that the said circuit court having found that the Union Stock Yards constituted the depot of the defendants for the delivery of live stock, it follows, as a legal conclusion that they were bound to deliver live stock to that depot without imposing the $2 terminal charge.

14. In that the circuit court of appeals did not decide that the said circuit court erred in not entering a judgment and decree enforcing the orders of the Interstate Commerce Commission in this cause, for the reason that it appears from the findings of

fact of the Interstate Commerce Commission that the $2 terminal charge was imposed by a concerted agreement among the carriers entering Chicago, and was therefore an unlawful charge, as being in violation of the anti-trust law of 1890.

15. In that the circuit court of appeals did not decide that the said circuit court erred in failing to consider and give due weight to each and all of the findings of the Interstate Commerce Commission, and in basing its judgment upon an erroneous assumed state of facts.

16. In that the said circuit court of appeals erred in finding in its decree, in effect, that the said $2 terminal charge in question in this suit was not unreasonable, unjust or unlawful.

17. In that the said circuit court of appeals erred in failing to consider and give due weight and *prima facie* effect to each and all of the findings of the Interstate Commerce Commission as set out in its report and findings of fact herein, and said circuit court of appeals erred in basing its judgment upon an erroneous and assumed state of facts.

18. In that the said circuit court of appeals did not decide and hold, upon the finding of the Interstate Commerce Commission, that "June 1, 1894, these defendants (being competing carriers) by concerted agreement among themselves increased this (through) rate $2 per car;" that said agreement of defendants and the means by which that addition to the through rate was by them imposed upon the interstate traffic in question constituted a violation of the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and could not, therefore, be entertained as a defense in this case.

Grounds of Appellant's Argument.

The Interstate Commerce Commission held that the imposition of the so-called terminal charge was unjust and unreasonable and that it constituted an undue and unreasonable preference to other markets as compared with Chicago (Record, pp. 47, 55). These findings of fact brought the case within the prohibitions of both the first and the third sections of the interstate commerce act. It was,

therefore, within the scope of the Commission's powers to make this order directing the defendants to cease and desist from the charge. The refusal of the circuit court to enforce this order was unwarranted by law. This was so for the following reasons:

First. The Commission found that the imposition of the terminal charge was unjust and unreasonable, and constituted an undue prejudice to Chicago (pp. 16–22).

1. This was a question of fact committed by statute to the decision of the Commission (pp. 16, 17).

2. Even if, upon this record, the question were open, there could be no doubt of the soundness of the finding (pp. 17–22).

Second. There was nothing before the Circuit Court warranting it in disregarding the decision of the Commission (pp. 23–33).

1. The finding of the Commission was *prima facie* binding upon the Circuit Court (23–26).

2. There was no proof contrary to that finding (p. 26, 27).

3. The decision of the Circuit Court was based upon assumptions wholly unsupported by evidence (pp. 27–29).

4. The case of Walker vs. Keenan, 73 Fed. Rep., 755, is not controlling here (pp. 29–33).

The decree of the Circuit Court was, therefore, erroneous.

FIRST.

THE COMMISSION FOUND THAT THE IMPOSITION OF THE TERMINAL CHARGE WAS UNJUST AND UNREASONABLE, AND CONSTITUTED AN UNDUE PREJUDICE TO CHICAGO.

I. This was a question of fact committed by statute to the decision of the Commission.

The first section of the act to regulate commerce declares unjust and unreasonable charges to be unlawful, and prohibits the same, and the third section prohibits undue and unreasonable preferences as between localities. In neither case does the act specify what constitutes an unreasonable charge, or an undue preference. The twelfth section of the act empowers the Commission to execute and enforce the provisions of the act, and for that purpose to investigate the facts. The fifteenth section provides "that if, in any case "in which an investigation shall be made by said Commission, it "shall be made to appear to the satisfaction of the Commission, "either by the testimony of witnesses or other evidence, that any- "thing has been done, or omitted to be done, in violation of the "provisions of this act, * * it shall be the duty of the Com- "mission to forthwith cause a copy of its report in respect thereto "to be delivered to such common carrier, together with a notice to "said common carrier to cease and desist from such violation, "within a reasonable time to be specified by the Commission."

These provisions of the act do not attempt to define unjust charges or unreasonable preferences, but give the Commission power to enforce the provisions of the act against such charges or preferences, and to require the carrier to cease and desist therefrom. They, therefore, necessarily give to the Commission power to determine and find whether there is an unjust charge or an undue preference. Indeed, the Commission was established mainly in aid of rights of shippers already existing at common law, for the purpose of affording a convenient method of ascertaining whether those rights had been violated. Accordingly, it is settled by authority that the question whether there is an unjust and unreasonable charge or an undue and unreasonable preference, is a question of fact to be determined by

First. The Commission found that the so-called terminal charge was unreasonable and undue.

II. If the question were open, there could be no doubt of the soundness of the finding.

the Commission in view of the circumstances of each case (Cincinnati, N. O. and Texas Pacific Co. vs. Interstate Commerce Commission, 162 U. S., 184, 196, Texas and Pacific Railway Co. vs. Commission, 162 U. S., 197, 219, 238; Interstate Commerce Commission vs. Alabama Midland Co., 168 U. S. 144, 170, 175; Louisville Co. vs. Behlmer, 175 U. S., 648, 675; Matthews vs. Board, 106 Fed., 7). Inasmuch as the testimony before the Commission was excluded upon defendants' objection (Record, pp. 250, 251), it is idle to argue that its findings were unsupported by testimony. Those findings were by the statute *prima facie* evidence of the facts which they stated, and could be rebutted only by evidence and not by argument.

There is nothing in the suggestion that the orders were unlawful as establishing a rate (Appellees' Brief below, pp. 21–28; Interstate Commerce Commission vs. Alabama Co., 168 U. S., 144, 161, 162). As just said, the Commission is expressly, authorized by section fifteen of the act to prohibit violation of any provisions of the act including exacting unreasonable rates and the exercise of such a power does not constitute making a rate. This is settled by Reagan vs. Trust Co., 154 U. S., 362; Smyth vs. Ames, 169 U. S., 466; 171 U. S., 361, and the similar cases which hold that while a court, as well as the Commission, has no power to make rates, it has full power to decide whether those made by the carrier are reasonable. So, too, the power of the Commission to pass upon the question of reasonableness of rates is fully affirmed in Interstate Commerce Commission vs. Alabama Midland Co. (168 U. S., 144, 173). This is precisely what the Commission did here. It decided that the imposition of the so-called terminal charge was unreasonable; it made no order regarding the figure to which the rate should be reduced, but merely stated its views as to the extent of the overcharge for the information of the carriers (Record, pp. 44, 47).

II. Even if upon this record the question were open, there could be no doubt of the soundness of the finding.

Even aside from this finding of the ultimate fact by the Commission, there can be no doubt upon the subject. Common carriers

engaged in the business of transporting live stock are bound to furnish facilities for unloading the same at the point of destination—they cannot charge the shipper what it may cost the carrier to procure the performance of that service even by an independent agent.

In Covington Stock Yards Co. vs. Keith, 139 U. S., 128, the court said, " the contention just adverted to is, in effect, " that the carrier may, without a special contract for that " purpose, require the shipper or consignee, in addition to " the customary and legitimate charges for transportation, to " compensate it for supplying the means and facilities that " must be provided by it in order to meet its obligations to " to the public. To this proposition we cannot give our " assent.

" When animals are offered to a carrier of live stock to " be transported it is its duty to receive them; and that " duty cannot be efficiently discharged, at least in a town or " city, without the aid of yards in which the stock offered " for shipment can be received and handled with safety and " without inconvenience to the public while being loaded " upon the cars in which they are to be transported. So, " when live stock reach the place to which they are con- " signed, it is the duty of the carrier to deliver them to the " consignee; and such delivery cannot be safely or effect- " ively made, except in or through inclosed yards or lots, con- " venient to the place of unloading. In other words, the duty " to receive, transport and deliver live stock will not be fully " discharged, unless the carrier makes such provision, at the " place of loading, as will enable it to properly receive and " load the stock, and such provision, at the place of unload- " ing, as will enable it to properly deliver the stock to the " consignee " (p. 134).

In Walker vs. Keenan, 73 Fed. Rep., 755, 759, the court said, " as incidental to its business of transporting or hauling " cattle, a railroad company must provide the means of load- " ing, unloading and caring for such freight pending its " delivery to the consignee "(p. 759).

In the present case, therefore, it was the duty of the defendants to furnish such facilities, and they discharged that duty by means of the Stock Yards. They had no terminal facilities of their own for delivering live stock at Chicago; for thirty years prior to June 1, 1894, such deliveries were uniformly made at the Stock

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Yards ; during all that time the rates for transporting live stock to Chicago included their delivery at the Stock Yards ; that rate was a reasonable rate for the service. These facts were found by the Commission and were not contradicted by any evidence at the trial. They were conceded by Defendants' Brief below (pp. 32-35).

Upon June 1, 1894, the Stock Yards Company imposed a charge for the use of their terminal facilities amounting to an average of $1 per car. With that exception, precisely the same conditions prevailed after that date as before it. As the through rate embraced the service of delivery at the Stock Yards before that time, it equally embraced that service thereafter, and so the Commission has necessarily found (Record, p. 50).

Thereupon, the defendants issued the circulars, which constitute their only evidence.

Notwithstanding a suggestion by the court (Record, p. 183), the defendants made no effort to explain these circulars (Record, p. 235). Indeed, as their terms were plain, probably nothing of the sort would have been competent.

Furthermore, the defendants made no effort to show that there was any division or segregation of the existing rate. In answer to a question by the court, their counsel said " on " the question of the division of the rates we have no other " testimony to offer than the tariff sheets which we have " already offered " (Record, p. 234). When the Commission sought to prove that the Chicago rates remained the same after the terminal charge was imposed as they had been before that time, the testimony was ruled out upon the objection of the defendants (Record, p. 157). In their brief below the appellees devoted eight pages (pp. 38-46) to an argument that it was competent for the court to receive testimony in addition to the findings of the Commission. Inasmuch as the general rule is unquestionable (Interstate Commerce Commission vs. Alabama Co., 168 U. S., 144, 174, 175), and the defendants offered no such testimony but objected to whatever the appellants offered, this seems a waste of time. It rather emphasizes the rule that the Commission's findings must be deemed controlling ; it was open to the defendants to rebut those findings, but they did not see fit to do so.

These circulars merely gave notice that live stock delivered at the Stock Yards would " *in addition to the rates named to or from Chi-*

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"*cago*, be subject to a terminal charge of $2 per car" (Record, p. 198). They showed nothing save an addition to the rate. They did not purport to diminish or limit the service which had always been rendered for the through rate, or to subdivide or "segregate" the same, but merely made "an addition" to that rate.

The appellees' case depends upon the claim that these circulars effected a modification, or "segregation," as they are fond of saying, in the through Chicago rate previously existing. It has been already pointed out that their brief contained a number of unfounded statements regarding these circulars (*supra*, p. 10). Its efforts to dodge the question of the reasonableness of what was done are illustrated, too, by the fact that it argues at length (Brief, pp. 30–35) that what was done was really to modify the through Chicago rate, and then that the Chicago rate is not now before the court (Brief, pp. 47–49).

The argument is that while the terms of the circulars merely made an addition to the Chicago rate as a so-called terminal charge, in point of fact they raised all the Chicago rates and subdivided them into a through charge to the end of the lines of each carrier, and a terminal charge from that point to the stock yards. But this is merely imagination. The legal effect of the circulars must be judged by their plain terms. They did not purport to modify the through rate. Moreover such a modification could be made only by publishing the same in the manner provided by the interstate commerce act (Sec. 6). So, too, the parties interested in the through rate were not the same as those interested in the terminal charge, inasmuch as the latter enured only to the roads entering Chicago, and, therefore, it cannot be claimed that the through rates were raised without any action whatever by many of the carriers who were parties to them.

As the through rate prior to June 1, 1894, covered delivery at the Stock Yards, it equally covered that service thereafter. The circulars merely added $2 to the rate, without any addition whatever to the service rendered. As the previous rate was presumptively reasonable, and nothing occurred warranting its increase save the imposition of a $1 charge by the Stock Yards Company, the $2 addition by the defendants was unreasonable. This seems too plain for argument.

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In any case this additional terminal charge was unlawful, because it was imposed by concerted agreement among the defendants in violation of the anti-trust law. Prior to June 1, 1894, the Chicago rate covered the cost of delivery at the Stock Yards. Upon that date the Stock Yards Company imposed a trackage charge which varied from 80 cents per car for the shortest lines to $1.50 per car for the longest lines. The defendants were competing carriers for the traffic. Thereupon, in order to secure a uniform rate, the defendants, by concerted agreement among themselves, increased the rate by adding a uniform terminal charge of $2 per car. Otherwise, the shorter lines would have secured the business at the lower rate made to them by the Stock Yards Company, and to the exclusion of the longer lines. Such action comes within the definition of an illegal combination (Pettibone vs. U. S., 148 U. S., 197; U. S. vs. Goldberg, 7 Biss., 175, 25 Fed. Cas., 175; U. S. vs. Babcock, 3 Dill., 581, 24 Fed. Cas., 913).

These facts were found by the Commission (Record, pp. 25, 38, 43, 50), and were not disputed at the final hearing. Moreover, after the defendants had introduced in evidence their circulars establishing the additional $2 charge, the complainant called a witness to prove the details of the combination which led to that addition to the rate; this testimony was excluded on the defendants' objection (Record, pp. 250, 251), and this ruling is assigned as error (*supra*, p. 12). Still further, the testimony of defendants' witness Courtright (Record, p. 242), affirmatively shows that the general managers of the defendants put this additional charge into effect through a joint agency known as the Western Freight Association, of which all the defendants were members (Record, pp. 185, 242); which published all joint and through tariffs (Record, p. 243), and which effected the increase by its "Joint Circular No. 62" (Record, p. 244), and the Atchison circular which was issued somewhat subsequently purported on its face to be a "reissue of Western Freight Association Joint "Circular No. 62" (Record, pp. 197, 198).

Without this combination the public would have had the advantage of the least expensive route. A majority of the defendants were required to pay only the 80-cents trackage charge; and, if competition had prevailed, no greater increase could have lawfully been

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made. But the defendants agreed that the rates by all the lines must be equal, so that they might all participate in this competitive traffic (Record, p. 249). As the additional expense would be 80 cents by the shorter and $1.50 by the longer routes, they agreed, somewhat illogically, to add $2 per car in all cases.

It should be observed, too, that this so-called terminal charge was imposed only upon cattle coming from the West, and not upon cattle coming from the East. For example, the Wabash Company imposed a terminal charge of $2 upon all cattle coming from the West and $1 upon all cattle coming from the East. In other words, the Eastern lines did not combine, while the Western lines did do so (Record, pp. 30, 38). The Wabash Company, therefore, was enabled by the combination to impose a charge 100 per cent greater upon Western cattle than upon Eastern cattle. This strongly illustrates the effect of the combination.

The charge imposed as the result of this combination in restraint of commerce between the states constitutes the defense of the appellees It is obvious that a charge thus fixed cannot be enforced by the courts. The agreement was in itself illegal (U. S. vs. Trans-Missouri Association, 166 U. S., 290, 339; U. S. vs. Joint Traffic Association, 171 U. S., 505), and "the rule of law is of "universal application that none shall, by the aid of a court of "justice, obtain the fruits of an unlawful bargain" (Russell vs. DeGrand, 15 Mass., 35, 37, cited with approval in Gibbs vs. Consolidated Gas Co., *infra*). This is met by the appellees with the suggestion that the Commission has no power to administer the anti-trust law (Sprigg vs. Baltimore & Ohio Co., 8 Interstate Commerce Reps., 443). But this is quite without force. The Commission made no effort to do so in the present case, but found the so-called terminal charge to be unreasonable on the facts and brought the present action to enforce its order. Thereupon the defendants set up that the "addition" to the rates effected by the circulars was lawful—that is their only defense. But the proof shows that it was the result of an unlawful combination having as its sole purpose the suppression of competition. Surely it is idle to claim that a court of equity cannot give attention to such facts but must carry the combination into effect.

First. The Commission found that the so-called terminal charge was unreasonable and undue.

II. If the question were open, there would be no doubt as to the soundness of the finding.

In Gibbs vs. Consolidated Gas Company (130 U. S., 396), it appeared in evidence on the trial, although the point was not raised by the pleadings, that the service for which compensation was sought by the plaintiff was rendered in obtaining for the defendant a contract to restrain competition in the price of gas to be furnished to the public. The court said (p. 410), "innumerable cases, however, might be cited "to sustain the proposition that combinations among those "engaged in business impressed with a public or *quasi* public "character which are manifestly prejudicial to the public "interest cannot be upheld. The law 'cannot recognize as "'valid any undertaking to do what fundamental doctrine "'or legal rule directly forbids. Nor can it give effect to "'any agreement the making whereof was an act violating "'law.'"

In East Tennessee, Virginia and Georgia Railway vs. Interstate Commerce Commission, 99 Fed. Rep., 52, the United States circuit court of appeals for the sixth circuit refused to give effect to rates which were reached by agreement between competing lines. It said, "the interstate com-"merce law, it is conceded, was intended to encourage "normal competition. It forbids pooling for the very pur-"pose of allowing competition to have effect. But it is not "in accord with its spirit or letter to recognize, as a condi-"tion justifying discrimination against one locality, competi-"tion at a more distant locality when competition at the "nearer point is stifled or reduced, not by normal restric-"tions, but by agreement between those who otherwise would "be competing carriers. The difference in conditions thus "produced is effected by a restraint upon trade and com-"merce, which is not only violative of the common law, but "of the so-called Federal anti-trust act." There is nothing in the subsequent opinion of this court in the case which modifies these rules (181 U. S., 1, 25).

There can be no question, therefore, as to the Commission's decision that the terminal charge was unjust and unreasonable and constituted an undue and unreasonable prejudice to Chicago.

SECOND.

THERE WAS NOTHING BEFORE THE CIRCUIT COURT WARRANTING IT IN DISREGARDING THE DECISION OF THE COMMISSION.

I. The finding of the Commission was prima facie binding upon the Circuit Court.

By section fourteen, of the interstate commerce act, it is provided that the findings of the Commission shall "in all judicial proceedings, be deemed *prima facie* evidence as to *each* and *every* fact "found;" and by section sixteen of the act, it is provided that on hearings such as the present "the findings of fact in the report of "the said commission shall be *prima facie* evidence of the matters "therein stated." The meaning of the expression *prima facie* evidence is general and its force in this statute is settled by authority.

In Kelly vs. Jackson (6 Peters, 622, p. 632) the court said, "what is *prima facie* evidence of a fact? It is such "as, in judgment of law, is sufficient to establish the fact; "and, if not rebutted, remains sufficient for the purpose. "The jury are bound to consider it in that light, unless they "are invested with authority to disregard the rules of evi"dence, by which the liberty and estate of every citizen are "guarded and supported. No judge would hesitate to set "aside their verdict and grant a new trial if, under such cir"cumstances, without any rebutting evidence, they disregard "it. It would be error on their part, which would require "the remedial interposition of the court. In a legal sense, "then, such *prima facie* evidence, in the absence of all con"trolling evidence or discrediting circumstances, becomes "conclusive of the fact; that is, it should operate upon "the minds of the jury as decisive to found their verdict as "to the fact. Such we understand to be the clear principles "of law on this subject."

In Pillow vs. Roberts (13 Howard, 472), in passing upon an ingenious construction of the phrase, contrary to its ordinary meaning, the court said (p. 476), "it is easy, by very "ingenious and astute construction, to evade the force of "almost any statute, where a court is so disposed. * * "Such a construction annuls this provision of the law and "renders it superfluous and useless. The evil plainly in"tended to be remedied by this section of the act, was the

Second. There was nothing before the Circuit Court warranting it in disregarding the decision of the Commission.

I. The finding of the Commission was prima facie binding upon the circuit court.

" extreme difficulty and almost impossibility of proving the " facts in question."

In Allen vs. Hawks, 11 Pickering, 358, the court considered the weight to be given to the report of an auditor which the statute made *prima facie* evidence, and said (p. 360), " it is *prima facie* evidence upon which a jury will be " warranted to give a verdict, and bound to do so, unless over- " balanced by other evidence." In Holmes vs. Hunt (122 Mass., 505), the effect to be given to the same statute was again under consideration, and the court held that the report of an auditor is *prima facie* evidence, not only of the result of the accounts, but of the facts and inferences stated in his report as derived from the evidence before him and involved in the determination of the issues submitted to him, even if they include a finding upon the general question whether the defendant is or is not liable to the plaintiff.

In Texas and Pacific Railway Company vs. The Interstate Commerce Commission (162 U. S., p. 197), the court said (p. 238), " if the circuit court of appeals was of opinion that " the Commission in making its order had misconceived the " extent of its powers, and if the circuit court had erred in " affirming the validity of an order made under such miscon- " ception, the duty of the circuit court of appeals was to re- " verse the decree, set aside the order, and remand the cause " to the Commission, in order that it might, if it saw fit, " proceed therein according to law. The defendant was en- " titled to have its defense considered, in the first instance, " at least, by the Commission upon a full consideration of all " the circumstances and conditions upon which a legitimate " order could be founded. The questions whether certain " charges were reasonable or otherwise, whether certain dis- " criminations were due or undue, were questions of fact, to " be passed upon by the Commission in the light of all facts " duly alleged and supported by competent evidence, and it " did not comport with the true scheme of the statute that " the circuit court of appeals should undertake, of its own " motion, to find and pass upon such questions of fact, in a " case in the position in which the present one was."

In Interstate Commerce Commission vs. The Alabama M. R. Co. (168 U. S., 144) the court announced the rule with reference to the effect to be given to the findings of the Commission and the power of the court to review the same as follows (p. 175), " accordingly, our conclusion is that it was

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" competent, in the present case, for the circuit court, in " dealing with the issues raised by the petition of the Com- " mission and the answers thereto, and for the circuit court " of appeals on the appeal, to determine the case upon a con- " sideration of the allegations of the parties and of the evi- " dence adduced in their support, giving effect, however, to " the findings of fact in the report of the Commission as " *prima facie* evidence of the matters therein stated. The " inference is clear that in the absence of any evidence before " the circuit court, effect could not be given to the *prima* " *facie* case made by the findings, except by enforcing the " order of the Commission if upon its face it appeared to be " lawful."

In Louisville and Nashville Railway Company vs. Behlmer, 175 U. S., 648, the court said, " but the law attributes *prima facie* effect to the findings of fact made by the Commission, and that body, from the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon questions of fact of the character here arising " (p. 675).

In East Tennessee Co. vs. Interstate Commission, 181 U. S., 1, it was again held that the court cannot make original findings of fact overruling the Commission. The court said " whilst the court has in " the discharge of its duty been at times constrained to " correct erroneous constructions which have been put by " the Commission upon the statute, it has steadily refused, " because of the fact just stated (that the Commission is " specially charged by law with the determination of " fact) to assume to exert its original judgment on the facts, " where, under the statute, it was entitled, before approaching " the facts, to the aid which must necessarily be afforded by " the previous enlightened judgment of the commission " upon such subjects " (p. 27).

In Interstate Commerce Commission vs. Louisville and Nashville Company 102 Fed. Rep., 709, the circuit court for the southern district of Alabama thus stated the correct rule as to the weight to be given to the findings of the Interstate Commerce Commission, " the court is not " so clear as to the proposition that the rates from " New Orleans to Lagrange are unreasonable and unjust " in themselves and relatively so as compared with the rates " to Atlanta. The question as to what is a reasonable

Second. There was nothing before the Circuit Court warranting it in disregarding the decision of the Commission.

II. There was no proof contrary to the finding.

" and just rate is a very difficult one. ' No more difficult prob-
" ' lem can be presented than this ' (Ames vs. R. R. Co.,
" 64 Fed. Rep., 173 ; United States vs. Freight Asso., 166
" U. S., 332). But the findings of fact in the report of the
" Commission are made by law *prima facie* evidence of the
" matters therein stated, and the conclusions of the Commis-
" sion based upon such findings are presumed to be well
" founded and correct, and they will not be set aside unless
" error clearly appears " (p. 710).

The result of these rules is that, in the present case, the facts and inferences found in the report of the Commission should have been taken as true, unless disproved. This rule has all the more force because the testimony taken before the Commission was offered and excluded upon the defendants' objection (Record, p. 271). As the proof upon which the Commission's findings were based was not before the court, all the more were those findings conclusive unless disproved by affirmative evidence. No effort was made to do this; instead the defendants contented themselves with voluminous criticism of the conclusions reached by the Commission upon the evidence which was excluded upon the defendants' own objection. This, of course, was an empty reply to the statutory provision making the findings of the Commission *prima facie* evidence and, therefore, conclusive, unless disproved by something better than the ingenious contentions of counsel.

II. There was no proof contrary to the finding of the Commission.

As already said, the defendants put in no evidence save the circulars establishing the terminal charge (Record, pp. 95–230). These had been already considered by the Commission (pp. 9, 42, 74), so that they introduced no new element into the case. In any event, it has been already shown that they did not rebut the findings of the Commission (*supra*, pp. 10, 11, 18, 19). They showed that the charge was imposed, but they were without force as to its reasonableness.

Second. There was nothing before the Circuit Court warranting it in disregarding the decision of the Commission.

III. The decision of the circuit court was unsupported by evidence.

The appellees' contention that the so-called terminal charge must be deemed reasonable because it was imposed, is obviously without merit in view of the express finding of the Commission that under the circumstances it was unreasonable. This contention was disposed of exactly in Interstate Commerce Commission vs. Alabama Midland Co., 168 U. S., 144. The court after quoting from the opinion below, said, " the last sentence in this extract is objected to " by the Commission's counsel as declaring that the determination " of the extent to which discrimination is justified by circumstances " and conditions should be left to the carriers. If so read, we should " not be ready to adopt or approve such a position. * * It does " not mean that the action of the carriers in fixing and adjusting the " rates, in such instances, is not subject to revision by the Commis- " sion and the courts, when it is charged that such action has re- " sulted in rates unjust or unreasonable, or in unjust discriminations " and preferences " (p. 173).

III. The decision of the Circuit Court was based upon assumptions wholly unsupported by evidence.

Thus, the court said that the defendants effected " a segregation " of their freight charges from the Missouri river and other stock-ship- " ping centres to the Union Stock Yards, so that the Chicago rate did " not include the expenses or charges incurred in the delivery at the " stock yards from the tracks of defendants, and did make a " special rate from their tracks to the stock yards. * * The " act provides in what manner rates may be changed. The defend- " ants have complied with that requirement, and there can be no " doubt but that they have—as they legally might—divided up or " segregated their Chicago and terminal charges " (Record, pp. 252, 253). In this the court apparently adopted the erroneous statements of the brief for the defendants (*supra*, pp. 10, 19), rather than made an independent examination of the record.

The statement is entirely unsupported by evidence. The Commission found, in terms, that the through rate on May 31, 1894, included, as it had for thirty years, delivery at the Stock Yards (Record, pp. 25, 49, 50). Even the circuit court expressed its con-

Second. The Circuit Court was not warranted in disregarding the finding of the Commission.

III. The decision of the circuit court was unsupported by evidence.

currence in the Commission's finding, that "the defendants had no "adequate facilities for handling stock upon their own lines; "* * the stock yards were the common depot of the several "defendants for the delivery of stock consigned to Chicago" (Record, p. 252). The circulars which defendants offered made no change in this condition, but simply imposed a charge of $2 for performing this service, "*in addition*," as they say, to the rate already existing (Record, p. 206). Manifestly, there was no "segregation" or subdivision of the rate—merely an addition thereto. Calling it a "segregation" was a mere flight of fancy, without support in the record. This somewhat unusual term seems, at times, to have had an almost hypnotic effect.

There are further illustrations of the disregard of the record by the Circuit Court in reaching its conclusion. Thus it said that, "in 1893, the Stock Yards Company assumed "the entire work of hauling cars from the intersection of the "stockyards tracks with defendants' lines, respectively, to "the yards and charged the defendants therefor on the basis "of what it had cost defendants theretofore for the same "service. On June 1, 1894, the Stock Yards Company added "to this sum a trackage charge of 40 cents per car each "way" (Record, p. 252). This is erroneous. The evidence was that the Stock Yards Company hauled only cars containing dead freight (Record, p. 24). In respect to live stock, it merely imposed a trackage charge, and the defendants, in all cases, by their own motive power and with their own crews, transported the cars to and from the Stock Yards (Record, pp. 24, 33).

There was some suggestion in the record and considerable assertion in the brief for the defendants that, after the imposition of the terminal charge, the through rate to Chicago was reduced, but this was without support in the testimony (Record, p. 53), and the appellant's efforts to make proof as to the actual facts were defeated by the defendants' objection (Record, pp. 145, 157).

It is elementary that under the circumstances just stated, the tracks to the Stock Yards are to be regarded as part of the road of each defendant (Interstate Commerce Act, Sec. 1). It was, therefore, useless to discuss, as the Circuit Court did at considerable length and the defendants' brief below did almost without limit

(pp. 8–12, 50–61), whether or not $2 would be a fair compensation for that part of the contract of carriage consisting of carriage from the termination of the lines of the appellees and delivery at the Stock Yards. That service was never performed separately; that charge was never imposed separately; no live stock was ever delivered at Chicago which paid only this charge. The charge was not imposed as a separate charge, but only as a charge "*in addition*" to the rates named to or from Chicago" (*supra*, pp. 10, 11, 18, 19). It was, therefore, idle to consider this charge "by itself." No corresponding service was ever rendered "by itself" and this charge was not established as paying for independent service, but merely as "additional" to the charge already made for the entire service, including delivery at the Stock Yards.

In the most recent case upon the subject (East Tennessee Co. vs. Interstate Commerce Commission, 181 U. S. 1, 27, 28), it was held that the course followed here was erroneous; that the court has no power in the absence of new testimony to make findings of fact differing from those of the commission and reverse upon such findings; the utmost it can do is to correct any error of law and remit the case to the commission for further proceedings in accordance therewith. The discussion by defendants' counsel and by the Circuit Court as to whether this was reasonable as a separate charge was, therefore, idle, because it was not based upon the facts of the case. The question was whether it was reasonable to add this to the existing rate for transportation to the Stock Yards without any increase whatever in the service rendered.

IV. The case of Walker vs. Keenan, 73 Fed. Rep., 755, is not controlling.

The answers of the defendants relied strongly upon the decision of the Circuit Court of Appeals in Walker vs. Keenan, 73 Fed. Rep., 755. Indeed, as they offered no defensive testimony, it is not too much to say that their sole reliance is upon that authority. The Circuit Court, too, regarded that case as decisive of the present, saying "that such segregation could have been legally accomplished

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IV. The case of Walker vs. Keenan is not controlling.

" and was both advisable and desirable, was unequivocally held in " the case of Walker vs. Keenan (73 Feb., Rep., 758). This, too, is " *the spirit of the Covington Stock Yards case* " (139 U. S., 128). The Circuit Court of Appeals entertained the same view of the effect of Walker vs. Keenan (Record, pp. 263, 265; 103 Fed. Rep., 249); and, therefore, wholly failed to notice the question of reasonableness or undue prejudice (Record, p. 265). It declined to follow the general rules upon the ground that live stock is " an " exceptional kind of traffic " (Record, p. 264). This was an error in fact, because the traffic amounts to nearly one thousand car loads per day (Record, pp. 29, 268); in any case it is difficult to see what weight this view could have in impairing the findings of the Commission.

Examination of Walker vs. Keenan, however, shows that it was not decided upon the facts found in this case. Walker vs. Keenan was decided, briefly, upon the grounds that the facts showed no obligation on the part of the carrier to deliver at points off its own line; that the Stock Yards were off the carrier's line (p. 761); that the carrier had established a rate for transportation to the termination of its own roads and an additional rate for transportation from that point to the Stock Yards and delivery thereat (pp. 760, 761, 762) and that this had been done by a separation or division of the original through rate (p. 762). So far as the report shows, it was not suggested by counsel and it certainly was not considered by the court that the through rate already covered the service of transportation to the Stock Yards and was reasonable compensation for the entire service and that the so-called terminal charge was by its very terms a mere " addition " to the through rate rendering the same unreasonable (p. 762).

This distinction between the cases was fully recognized by defendants' brief below (p. 7), which stated that " the " purpose of this application to the Commission, was to have " the terminal charge declared unreasonable—the previous " controversy having been over the legality of that charge, " even if reasonable in amount."

In addition to this, the Circuit Court of Appeals in Walker vs. Keenan disregarded the facts which controlled the decision of the Circuit Court. At the circuit the court said: " it is the duty of the carrier to furnish facilities for

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" loading, carrying and unloading. Its custody of the stock " remains and its obligation is not discharged until the ship- " per is furnished with proper facilities to unload. The " carriage includes the delivery, except at such a place as is " suitable to the delivery, of the particular thing carried. " * * * It is the duty of the carrier, therefore, to furnish " these facilities to the shipper " (64 Fed. Rep., 992, 994). The defendant had in fact no such facilities upon its own line (p. 993); its duty to furnish them was performed by " making the stock yards its depot for the delivery of live " stock " (p. 996). Upon appeal the Circuit Court of Appeals agreed with this rule of law (73 Fed. Rep., 759), but completely ignored the facts just stated. It said that " the " case is the same as though the petitioners themselves owned " the stock yards and the delivery station there and the " tracks leading to said station, and appellants charge them " $120 for transferring a car from appellants' line in Chicago " to said stock yards station (p. 761); * * * the delivery " is to be made at Chicago, but at a point away from the " carrier's line, and by means of a track not owned or pos- " sessed by the carrier " (p. 761). The court failed to give force to the fact that the carriers had " made the stock yards " its depot for the delivery of live stock at Chicago " (64 Fed. Rep., 996). But that was the crucial point of the decision below. The course of the Circuit Court of Appeals in thus disregarding tl e facts found below was manifestly erroneous (East Tennessee, Virginia & Georgia Co. vs. Interstate Commerce Commission, 181 U. S., 1, 27, 28).

In the present case, as already shown, the proof establishes a wholly different state of facts. For thirty years the Stock Yards had been the appellees' Chicago terminus for the delivery of live stock; the through rate had always embraced the entire service, including this delivery; when the so-called terminal charge was imposed no change was made in the character of the service, but there was merely an " addition " made to the previous rate for the same service; the previous through rate was reasonable for all the service up to and including delivery; nothing had occurred warranting any increase in the through rate, except the imposition by the Stock Yards Company of a trackage charge averaging $1 per car; the increase of the rate to the extent of $2 was, therefore, unjust and unreasonable, and constituted an undue preference as

against Chicago and in favor of other markets where this increase was not imposed. None of these facts were considered or so far as appears from the Circuit Court of Appeals, proved in the case of Walker vs. Keenan. Indeed, it is expressly said in that case (73 Fed. Rep., 762) that "it is not suggested, assuming "any such charge as is here in question to be legal at all, that the "amount is unreasonable." But in the present case that is the precise contention, and the proof establishes that the charge is unreasonable.

> The Commission stated this point exactly. It said, "this "decision of the circuit court of appeals the Commission "accepts. It assumes that, as a legal proposition, the carrier "may make a charge of the sort which it attempts to make "in this case, but it holds, as a matter of fact, that it is un- "reasonable to impose this terminal charge for the reason "that the rate to Chicago already includes that charge. The "circuit court of appeals says that the carrier may segregate "its rate, charging one part to a certain point and another "part beyond that point; but there is a wide difference be- "tween segregation and addition. What the carriers have "done here is to add an arbitrary sum for a service for which "they are already receiving a reasonable compensation" (Record, p. 51).

It is clear, therefore, that Walker vs. Keenan is without application to the present case. For it needs no argument to establish that this case must be decided upon the facts proved rather than upon the authority of a judicial decision in a case where these facts perhaps might have been proved, but evidently were not considered. As the court said in Louisville R. R. Co. vs. Behlmer, 175 U. S., 648, 673, "it involves a complete *non-sequitur* "to assert that because legal principles may not have been applied "to a given case, on the assumption that the facts did not render "their application necessary, therefore, in future cases, where it "was found that the facts brought the controversy within the prin- "ciples, they should not be applied."

In addition, the case of Walker vs. Keenan, was wholly inconsistent with Covington Stock Yards Co. vs. Keith, 139 U. S., 128. In that case a railway company had made an agreement with the Stock Yards Company, constituting that company its exclusive

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agent for the receipt and delivery of live stock shipped over the road, and a special charge was imposed for such delivery. The petitioner Keith had facilities of his own adjacent to the road, and prayed that the railroad company be compelled to deliver the live stock to him without exacting this extra charge. The court held that it was the carrier's duty to deliver the live stock, and that the petitioner was, therefore, entitled to receive the live stock through the Covington Stock Yards free of charge, or else upon his own premises.

It said, "and as the appellant has voluntarily undertaken to discharge the duty in these matters that rests upon the railroad company, the contention just adverted to, is, in effect, that the carrier may, without a special contract for that purpose, require the shipper or consignee, in addition to the customary and legitimate charges for transportation, to compensate it for supplying the means and facilities that must be provided by it in order to meet its obligations to the public. To this proposition we can not give our assent.

"When animals are offered to a carrier of live stock to be transported, it is its duty to receive them, and that duty cannot be efficiently discharged, at least in a town or city, without the aid of yards in which the stock offered for shipment can be received and handled with safety and without inconvenience to the public while being loaded upon the cars in which they are to be transported. So, when live stock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee, and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport and deliver live stock will not be fully discharged unless the carrier makes such provision at the place of loading as will enable it to properly receive and load the stock, and such provision at the place of unloading as will enable it to properly deliver the stock to the consignee. * *

"A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock in and through stock yards provided by itself, in order that it may properly receive and load or unload and deliver such stock, than a carrier of passengers may

" make a special charge for the use of its passenger depot by
" passengers when proceeding to or coming from its trains,
" or than a carrier may charge the shipper for the use of
" its general freight depot in merely delivering his goods
" for shipment, or the consignee of such goods for its use in
" merely receiving them there within a reasonable time after
" they are unloaded from the cars " (p. 135).

The Covington Stock Yards case, therefore, settled that no charge could be made by the carrier for use of the facilities necessary for delivery, whether the carrier furnished them itself or hired some other party to do so. This was conceded in Walker vs. Keenan, but the court held that the terminal charge covered the service of transportation from the end of the carrier's line to the point of delivery at the Stock Yards. This was not supported by the proof, which was that the charge was imposed merely as "an addition" to the through rate generally. But it is manifestly unsound, in view of the fact that the carrier had no station whatever for the delivery of live stock other than the Stock Yards, and that all shipments were accepted deliverable to consignees who were located at the Stock Yards (Record, pp. 23, 34, 42, 43). Under these circumstances the Covington Stock Yards case plainly held that no charge could be made for delivering the cattle at their destination. Its force is clearly pointed out in the dissenting opinion of Judge GROSSCUP in this case (Record, pp. 265–269).

The suggestion of the circuit court of appeals in Walker vs. Keenan (73 Fed. Rep., 755, 762) that the Covington Stock Yards case was prior to the interstate commerce law is without force. In point of fact, the decision was rendered in 1891, after the passage of the act. But these general rules regarding a carrier's duties have not been changed by the interstate commerce act. On the contrary, the statute carefully provides that all common law rights are preserved (Sec. 22) and that carriage must be continuous from the point of shipment to destination, and no device can be resorted to for the purpose of preventing continuous shipments (Sec. 7).

It is, therefore, manifest that the Circuit Court was not warranted in disregarding the finding of the Commission.

CONCLUSION.

The decree should, therefore, be reversed and the cause remanded to the Circuit Court with instructions to enter a decree for the complainant.

The case is very simple. The defendants were charging a reasonable rate to Chicago which included delivery at the Stock Yards. Upon June 1, 1894, the Stock Yards Company imposed a trackage charge of $1 per car. Thereupon the defendants in their own words "added to the Chicago rate" a so-called terminal charge of $2 per car. These facts are conceded. But the rate was reasonable before that time; nothing new occurred save an addition of $1 to the expense of performing the service; there was no change in the character of the service. Surely it was unreasonable to add to the rate twice the amount of the added expense.

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